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No. 85-1338

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD W. WYAND, SR.,
ROY MILLER SNYDER, JR. AND
ALBERT L. BRYAN,

Petitioners,

v.

STATE OF MARYLAND,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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COUNTERSTATEMENT OF QUESTION PRESENTED

Is a Maryland statute permitting certain nonprofit organizations to conduct gambling activities that commercial enterprises are prohibited from conducting, facially violative of the Equal Protection Clause of the Fourteenth Amendment because it lacks a rational relationship to any legitimate governmental interest?

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RICHARD W. WYAND, SR.
ROY MILLER SNYDER, JR. and
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v.

STATE OF MARYLAND, Respondent

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Respondent, the State of Maryland, by its attorneys, Stephen H. Sachs, Attorney General of Maryland, Dennis M. Sweeney, Deputy Attorney General, and C. J. Messerschmidt, Assistant Attorney General, respectfully requests that this Court deny

the petition for writ of certiorari filed in this case.

COUNTERSTATEMENT OF THE CASE

Petitioners are the owner and two employees of the "Locker Room Stag Bar" in Hagerstown, Maryland. They were convicted in the District Court of Maryland of conducting gambling operations at their place of business, in violation of Maryland laws prohibiting gambling for private profit.

Petitioners appealed to the Circuit Court of Maryland, contending that the charges against them were improper, inasmuch as Article 27, §255(b) of the Maryland Code authorizes various service-oriented organizations to conduct certain gambling activities. Petitioners asserted that the authorization violates state and federal constitutional guarantees of equal protection because it does not prohibit the described

organizations from using the proceeds of their gambling activities for the organizations' own benefit. Following a de novo hearing, the Circuit Court held that the statute is not rationally related to a legitimate governmental purpose and therefore is unconstitutional and void.

The State appealed to the Court of Appeals of Maryland, arguing that Article 27, §255(b) is rationally related to the State's legitimate interest in the entire range of functions performed by the organizations to which the statute applies. The Court of Appeals concluded that the General Assembly could legitimately seek to promote the existence of organizations of the types described in §255(b) and, consequently, that the statute is constitutional. Accordingly, it reversed the judgment of the Circuit Court and remanded the case to that court for trial of the charges against petitioners.

REASONS FOR DENYING THE WRIT

The only issue in this case is whether a statutory exemption from Maryland's anti-gambling statutes that is applicable only to various civic and other organizations is unconstitutional on its face. In their petition for the writ of certiorari, petitioners - for the first time - assert that the statute is somehow unconstitutional as applied. (Petition at 10-11.) That issue was never presented to or decided by the lower courts. Hence, it cannot now be raised in this Court.

Moreover, the decision of the court below - that the statute petitioners complain of does not violate the Equal Protection Clause - in no way conflicts with decisions of this Court or of other state courts and, indeed, is clearly correct. Accordingly, review of that decision by this Court is unwarranted.

1. **No Question of Constitutionality "As Applied" Is Properly Before This Court.**

The statute petitioners challenge provides that "any volunteer fire company or bona fide fraternal, civic, war veterans', religious or charitable organization" may conduct gambling activities for its own benefit. Throughout the proceedings in this case, petitioners' sole contention has been that this statute, on its face, creates a favored class in violation of the Equal Protection Clause. See Brief of Appellees at 1-2, State v. Wyand, 304 Md. 721, 501 A.2d 43 (1985) (Respondent's Appendix). On that basis alone, they have sought invalidation of that statute and, with it, the entire statutory scheme prohibiting commercial gambling in Maryland, under which they were charged and convicted.

Moreover, the issue of the statute's facial validity is the only issue that was

decided by the Court of Appeals of Maryland. In reviewing state court decisions, this Court has consistently refused to decide federal constitutional issues neither presented to nor decided by the state court. Webb v. Webb, 451 U.S. 493, 498-99, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981).

Even were that not the case, it is clear that petitioners' contention is utterly baseless. Petitioners purport to rely on Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), yet they offer nothing to indicate how Maryland's exemption of various organizations from its anti-gambling statutes may have been applied to the detriment of any racial or other minority. The reason for that omission is readily apparent - no evidence of such discriminatory application of the law exists. This is simply not a case in which a law "fair on its face" has been administered "with an evil eye

and an unequal hand." 118 U.S. at 373-74, 6 S. Ct. at 1073, 30 L.Ed. at 227.

2. The Decision of the Court Below Does Not Conflict with Decisions of This Court.

The ground of petitioners' equal protection claim is their contention that the exemption statute is ineffective to achieve the purpose for which they assert it was enacted. As the court below correctly recognized, such a contention does not rise to the level of a challenge to the constitutionality of a statute enacted - as this one was - in the proper exercise of the State's police power. When such a statute is at issue, "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." City of Cleburne v. Cleburne Living Center, 473 U.S. ___, ___, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985).

Petitioners suggest that the decision of the court below somehow conflicts with the decision of this Court in Cleburne. That suggestion is completely without merit. In Cleburne, the city had required a special use permit for a group home for mentally retarded individuals in a zone in which it would not have required such a permit for boarding houses, fraternity or sorority houses, and similar uses. This Court considered the possible grounds for the distinction and concluded that the group home did not differ from the permitted uses in any way that would cause the group home to pose a special threat to the city's legitimate interest. 473 U.S. at ____, 105 S.Ct. at 3259, 87 L.Ed.2d at 325. Accordingly, the Court held that the requirement was invalid as applied to that group home.

In deciding the present case, the court below followed a similar line of analysis.

BEST

It took note of the differences between the exempt organizations and private commercial enterprises. The state court also noted differences between gambling activities conducted for the benefit of those organizations and gambling conducted purely for private profit. Thus, the decision below is in full accord with the decision of this Court in Cleburne. That the two decisions reached differing results is merely a reflection of the different facts of the two cases.

Moreover, in Cleburne this Court pointed out that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude" in determining the best means of pursuing their interests. 473 U.S. at ___, 105 S. Ct. at 3254, 87 L.Ed.2d at 320. Thus, in declining to closely scrutinize the legislative choices in this case, the court below adhered closely to this Court's exposition of the Equal Protec-

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tion Clause in Cleburne. Accordingly, there is no ground of conflict between that decision and the decision of the court below in this case.

3. There Is No Conflict With Any Decision of Another State Court.

Petitioners assert a conflict between the decision of the court below in this case and the decision of the Supreme Court of Indiana in Fairchild v. Schanke, 232 Ind. 480, 113 N.E.2d 159 (1953). That case, however, is clearly distinguishable on both its law and its facts.

The Fairchild decision was not based on the Fourteenth Amendment to the United States Constitution. Instead, it rested on a provision of the Indiana constitution that prohibited the "'grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.'" 232 Ind. at 486,

113 N.E.2d at 162 (quoting Indiana Constitution, Article 1, §23). The Indiana court had earlier interpreted that provision as requiring that, when legislative classifications are made, "the reason for the classification must inhere in the subject-matter. The classification must rest upon some reason which is natural and substantial." Evansville & Ohio Valley Railway Co. v. Southern Indiana R.V. Corp., 231 Ind. 648, 654, 109 N.E.2d 901, 904 (1953). Thus, the State law that was the basis for the decision in Fairchild required that a legislative classification be more than simply the "rational means to serve a legitimate end" that is all the Equal Protection Clause requires in this case. See Cleburne, 473 U.S. at ___, 105 S.Ct. at 3255, 87 L.Ed. at 321.

Further, the statute at issue in Fairchild differed significantly from the

statute at issue in the present case. The Indiana statute had been enacted with the express purpose "'to restrain all persons from seeking profit from gambling activities in this State.'" Fairchild, 232 Ind. at 489, 113 N.E.2d at 161 (emphasis added by court). Nonetheless, the statute contained an exclusion from its provisions for religious, patriotic, charitable, and fraternal organizations. That exemption provision directly contravened the stated legislative purpose of the anti-gambling statute of which it was a part.

In sharp contrast, the exemption challenged in this case is a wholly separate statute from those generally prohibiting gambling in Maryland and was enacted for the stated purpose of permitting the described organizations to raise funds for their own benefit. American Legion v. State, 294 Md. 1, 9, 447 A.2d 842, 846 (1982). Thus, it is

clear that the statute at issue in this case differs significantly in both purpose and effect from that at issue in Fairchild. Under such circumstances, the bare fact of a difference in the outcomes of the two cases is in no way indicative of a genuine conflict between the decisions.

4. The Decision Below Was Clearly Correct.

The court below held that the statute at issue in this case is rationally related to a legitimate governmental purpose. Petitioners attempt to challenge that holding by asserting that the court misread the intent of the Maryland General Assembly in enacting the statute - an assertion that raises only a question of state law. The purpose served by the statute is expressed in its authorization of gambling activities "for the exclusive benefit of" the sponsoring organization. In light of the statutory language, the Maryland

Court of Appeals has previously pointed out that "the broad purpose of the Act ... is to permit service or charitable organizations to raise money for their benefit through a broad range of gambling activities." American Legion v. State, 294 Md. at 9, 447 A.2d at 846 (1982).

Unquestionably, the Court of Appeals was correct in noting that "the promotion of general charitable, civic, educational and public safety purposes is a proper object of legislation." State v. Wyand, 304 Md. 721, 728, 501 A.2d 43, 47 (1985). Cf. 26 U.S.C. §501(c) (exempting all income of various organizations from federal income tax). The organizations described in the exemption statute have as their purpose the promotion of just such objects. Accordingly, the court below correctly held that there is a rational basis for the enactment of this statute. Indeed, the contrary holding might well have

cast doubt on the validity of a wide variety of statutes benefiting the described organizations or their members, such as tax exemptions and veterans' employment advantages. See State v. Wyand, 304 Md. at 728-29, 501 A.2d at 47 (noting various statutory benefits).

CONCLUSION

The only federal question properly before this Court is whether a statute authorizing various civic, veterans', and other organizations to conduct gambling activities for their own benefit is invalid on its face, as a violation of the Equal Protection Clause. The decision of the court below upholding the validity of that statute in no way conflicts with decisions of this Court or of the courts of other states. Therefore, review of the decision by this Court is unwarranted, and respondents

respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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March, 1985

APPENDIX

Brief and Appendix of Appellees, p. 1-2.

IN THE

COURT OF APPEALS OF MARYLAND

NO. 48, SEPTEMBER TERM, 1985

STATE OF MARYLAND
APPELLANT

VS.

RICHARD W. WYAND SR.,
ROY MILLER SNYDER, JR.,
AND
ALBERT L. BRYAN
APPELLEES

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT
FOR WASHINGTON COUNTY
(John P. Corderman, Judge)

BRIEF AND APPENDIX OF APPELLEES

STATEMENT OF THE CASE

Appellees deem this portion of Appellant's brief accurate and adequate as a statement.

QUESTIONS PRESENTED

1. Is Article 27, Section 255 - author-

izing civic, charitable, and other nonprofit organizations to conduct gambling activities that commercial operators are prohibited from conducting - so lacking in a rational relationship to any legitimate governmental interest as to violate constitutional guarantees of equal protection of the laws?

A. The Factual Picture Developed By the Record

B. The Case Law

2. If Article 27, Section 255 is unconstitutional and void, was it proper for the Trial Court to dismiss the charges against Appellees?

STATEMENT OF FACTS

Appellees deem this portion of Appellant's brief to be accurate and adequate for the purpose.

ARGUMENT

I.

THE EXEMPTION PROVIDED BY SECTION

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